



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL 118, 119 & 120 OF 2007**

**JOHN KAMAU WAMBUGU.....1<sup>ST</sup> APPELLANT**

**ISAAC NJENGA NJONJO.....2<sup>ND</sup> APPELLANT**

**GEOFFREY NJUGUNA WANJIRU.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants herein John Kamau Wambugu, Isaac Njenga Njonjo and Geoffrey Njuguna Wanjiru (*herein after referred to as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants respectively*) were charged with the offence of robbery with violence contrary to **section 296(2) of the Penal Code**. The particulars of offence state that on the 19<sup>th</sup> day of December 2004 at Sakutiek Trading Centre in Narok District within the Rift Valley Province, the appellants, being armed with dangerous or offensive weapons namely a toy pistol, robbed Rachael Wanjiku Sukuma of her cash Kshs 250,000/=, two packets of sportsman cigarettes and a Maasai sword all valued at Kshs 250,600/= and that, at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Racheal Wanjiku Sukuma.

The 1<sup>st</sup> appellant was also charged with the offence of **being in possession of a home-made gun** contrary to **section 4(1) of the Firearms Act (Cap 114 Laws of Kenya)**. However he was acquitted of this offence for reasons that the weapon did not fall within the definition of a “*firearm*” under the **Firearms Act (Cap 114 of the Laws of Kenya)**.

After a full trial before the Hon. S. M. Githinji, Principal Magistrate, Narok, wherein 9 prosecution witnesses testified, the appellants were convicted of the offence of robbery with violence and sentenced to suffer death. They filed separate petitions of appeal citing similar grounds, which petitions were consolidated and heard together on 5<sup>th</sup> February 2009. The three appellants all claimed that their respective defences, which they considered sound enough to earn them an acquittal, were rejected for no good reasons. The three appellants filed written submissions alongside what they referred to as amended grounds of appeal. On his part the 1<sup>st</sup> appellant claimed that the learned trial magistrate wrongly convicted him merely on the basis of circumstantial evidence which in itself was not sufficient to justify conviction. He also contended that the evidence of recovery of the exhibits for which he was charged did

not conclusively prove his participation in the robbery. He argued that the learned trial magistrate ought to have considered his explanation that the money found on him, which he stated to have been Kshs 65,000/= and not Kshs 80,000/= as alleged by the prosecution, was not stolen money but his own earnings from the sale of farm produce. The 1<sup>st</sup> appellant claims also that the evidence of the various witnesses as to recovery of the stolen cash was contradictory and therefore ought not to have formed a basis of a conviction, particularly in the absence of the evidence of the driver and conductor of the vehicle in which the appellant was arrested before being searched and being found with the money.

On this part the 2<sup>nd</sup> appellant challenged his conviction and sentence claiming that the charge preferred against him was not proved to the required standards in that the evidence as to the recovery of the stolen sums of money was not conclusive and that none of the evidence tendered proved him to have been in anyway connected with the persons with whom he was jointly charged. He contended that there was doubt as to whether the sum of Kshs 45,250/= said by the prosecution to have been found on him was actually recovered in his possession. As did the 1<sup>st</sup> appellant the 2<sup>nd</sup> appellant maintains the view that the evidence surrounding the recovery of the said sum was contradictory, inconsistent and insufficient and ought to have been corroborated by the evidence of a possible essential witness, one Police Officer by the name PC Abuatum who was not called to testify despite the prosecution's evidence that he was the one who recovered the money from the 2<sup>nd</sup> appellant.

The 3<sup>rd</sup> appellant, who was found in possession of a Maasai sword also challenged the evidence of the recovery of the weapon on the basis that such evidence was contradictory and unreliable and ought, therefore, not to have formed a basis of the conviction in the absence of corroboration by other evidence of persons who were with him in the mini bus from which he was arrested. He contends that the sword could have belonged to any other person in the minibus and not necessarily the one alleged to have been stolen from the complainant's shop. The 3<sup>rd</sup> appellant referred us to the evidence of P.C. Maiyo who stated that;

***“When the 3<sup>rd</sup> accused was brought to our station he had nothing... I saw no exhibit at that point. It was alleged you were with others who were left in the matatu”.***

He also challenges the evidence of identification by PW3 who pointed him out to the Police, leading to his arrest. The 3<sup>rd</sup> appellant claims that if indeed PW3 identified him by description (*marks on the lips*) he ought to have given that description to the Police rather than refer to it only in court in the cause of his testimony. The 3<sup>rd</sup> appellant asked us to find that he was in no way connected with the robbery for which he was charged and convicted and that his defence of alibi ought to have been believed. The appellants cited various authorities in support of their appeals and the same have been duly considered.

The State represented by learned State Counsel **Mr. Njogu** has opposed this appeal on the basis that the three appellants were convicted on the basis of overwhelming evidence. They were found with huge sums of money, two packets of sportsman cigarettes and a maasai sword soon after a sum of 250,000/= cigarettes and a maasai sword were stolen from PW1's shop. They were arrested following a lead by a witness who saw the 3<sup>rd</sup> appellant near the scene of the robbery and who was able to identify the 3<sup>rd</sup> appellant by certain marks on his lips. According to the State it was the 3<sup>rd</sup> appellant who identified the rest of the appellants to the Police.

As is expected of us, being the first appellate court, we have examined the proceedings and judgment of the trial court, analysed and re-evaluated the evidence adduced at the trial. We have made our own independent conclusions. The complainant **Rachael Sukuma (PW1)** testified that she operated a grocery shop at Sakutiek. On the material date she closed her shop at 8.00 p.m. and retired to her dwelling house just behind the shop. As she was preparing dinner three men suddenly appeared one armed with a weapon which looked like a pistol. He placed the pistol against her neck as one of the thugs told him to kill her. She pleaded with them to spare her life. She removed some 250,000/= which was in her bedroom and gave it to them. The money was proceeds from her business. The thug who took the money left after asking his colleagues to tie her up. They told her that they had been paid Kshs 500,000/= to kill

her. She pleaded further and they left having locked her in the bedroom. With the help of a full moon she saw the thugs as they left the compound through the rear door. The complainant called her 8 year old son who came and opened the door for her. They alerted neighbours and told them that they had been invaded by thugs. The neighbours searched for the thugs in vain with the help of some administration police who had answered the alarm. Before they left the assailants had forced the complainant into her shop where they took two packets of sportsman cigarettes and a masai sword. The complainant got information the following morning that the thugs had been arrested. She was summoned to the Narok Police Station where she was shown the Maasai sword, two packets of sportsman cigarettes and some money (*which she was told was Shs 125,000/=*) all said to have been recovered from the thugs. She identified the sword as the one which had been stolen from her shop. She said that she knew it as one belonging to her father-in-law and identified it by its handle which she had said was black in colour and its sheath which was red. Although a parade was conducted for the identification of the robbers PW1 was not able to identify any of them. She was however, emphatic while being cross-examined by counsel for the 2<sup>nd</sup> appellant, that she was attacked by three people. There were three accused persons in the dock. During cross-examination by the 1<sup>st</sup> appellant, the complainant testified that she had solar electric lighting in her house and was able to see the assailants during the robbery. However she was terrified and was not able to see the attackers clearly, particularly because they had threatened to kill her. She was able to tell, however, that the 4<sup>th</sup> accused, who was not convicted, was not among the people who robbed her. During the examination in-chief the complainant did testify that her (step)son, Salonek Nkoimboni, accompanied those who went searching for the thugs after they fled.

**Salonek** testified as **PW2**. He stated that he was student at Kampala University and that PW1 the complainant was his stepmother. At about 8.40 p.m. on 19<sup>th</sup> December 2004 he was at Sakutiek trading centre where his stepmother had a shop. He heard screams from the step-mother's home and ran there. His stepmother told him that she had been robbed of money. With others, PW2 went round the plot searching for the suspects without success. Some administration Police men came and joined them. The search party proceeded to Ngondi (Nkondi), a small trading centre 20 km from Sakutiek where they remained until 4.00 a.m. A vehicle (*matatu*) arrived from Maela and a man called Daniel, who had accompanied the search party and who, on the material night was working in a hotel within PW1's plot identified the 3<sup>rd</sup> appellant, who was found in possession of a sword which PW2 said belonged to his grandfather. The 3<sup>rd</sup> appellant was questioned by the police officers and he said that his accomplices had remained in the vehicle from which he was removed. The group took another vehicle and proceeded to Kongoni Police Station where one of the police officers in the search party had requested that the vehicle from which the 3<sup>rd</sup> appellant had been removed be stopped and detained until the search party arrived. At Kongoni they found the same vehicle having been detained. The 3<sup>rd</sup> appellant pointed out the 1<sup>st</sup> and 2<sup>nd</sup> appellants as well as a 4<sup>th</sup> person (who was tried alongside the three but was acquitted) as his accomplices. PW2 testified further that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants were searched and a sum of Kshs 116,400 was recovered hidden in their pockets, inner wear and socks. Under cross-examination by Mr. Kilele counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, PW2 testified that the 3<sup>rd</sup> appellant was found in possession of a sword when he was removed from the matatu mini-bus. He did not have any money. PW2 further testified that he was present when the 3<sup>rd</sup> appellant pointed out the 1<sup>st</sup> and 2<sup>nd</sup> appellants to the police. He also testified that it was Daniel (*the complainant's neighbour*) who picked out the 3<sup>rd</sup> appellant in the vehicle from which he was removed.

**Daniel Kundai Parmuat** testified as **PW3**. He told the trial court that on the material night he was at his hotel at Sakutiek trading centre when at about 8.30 p.m. a stranger came and requested to be served some tea. It being closing time PW3 told the stranger that tea was finished but he could take a soda. The latter declined, saying it was cold, then left. About 15 minutes later PW3 heard screams from the complainant's quarters and headed there. PW1 told those who answered her screams that she had been locked up by thugs who had fled. Someone called police officers who came to the scene. PW3 informed the officers of a stranger who had called at his hotel a short while before. Asked if he could identify the stranger PW3 said he would. He was asked to accompany the police officers (and others) in pursuit of the stranger. They all boarded a vehicle and drove towards *Nkondi* direction. At *Nkondi* they searched for the thugs in bars and lodgings in vain. At 5.00 a.m. a bus arrived from Maela. PW3 entered the same

together with the two police officers and identified the stranger, who was searched and was found with a sword. He was removed from the vehicle and the bus left. Under interrogation the suspect said he was with three others on the bus which had now departed towards Kongoni. Police officers at Kongoni police station were asked to intervene and stop the bus. The search party, together with the 3<sup>rd</sup> appellant, proceeded to Kongoni police station where they found the bus detained. The 3<sup>rd</sup> appellant picked out his accomplices who numbered three. PW3 said that although he had not known the 3<sup>rd</sup> appellant before the incident he was able to identify him by certain marks on his lips. Under cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> appellant PW3 stated that although the persons who had attacked PW1 were not described to him, he accompanied the police to identify the stranger who had been at his hotel that evening and whom he considered suspicious. He testified further that the 3<sup>rd</sup> appellant pointed out the rest and they were arrested in PW3's presence. Cross-examined by the 3<sup>rd</sup> appellant PW3 testified that the sword, which was identified by PW2, was found next to the 3<sup>rd</sup> appellant's feet beside a bag that he carried and when asked about it the 3<sup>rd</sup> appellant said that the sword was given to him by his uncle.

PW4 was APC Jack Leseni of Sakutiek's chief camp. He testified that on 19<sup>th</sup> December 2004 at about 8.40 p.m. while on duty at the camp he and his colleagues heard screams coming from the shopping centre. They armed themselves and rushed to the scene. There they found members of the public who had come to answer screams from a woman who owned a house and shop at the centre. They questioned the woman who told them that three men had come into the shop holding a gun and demanded for money. She gave them the money she had without counting it. The Police Officers, with the help of the members of public conducted a search of the assailants who were said to have run away towards Maela. The group boarded a vehicle and drove towards Ngodi centre. An ambush was laid for vehicles coming from Maela and canter mini bus, which arrived at 4 a.m., was stopped. A man who operated an hotel at Sakutiek centre picked out a stranger who he had seen near the scene who he said he had been to his hotel. A sword was recovered from the stranger. The suspect was arrested and taken to a nearby anti-stock theft camp where he told the search party that his colleagues were also in the vehicle which had now been let off. PW4 and his colleagues telephoned Kongoni police station and asked them to stop the vehicle. At Kongoni the search team found the vehicle already impounded. The suspect whom they had arrested and whom PW4 said was the 3<sup>rd</sup> appellant picked his colleagues while they were still in the vehicle. They were told to alight. A search was conducted in the vehicle and at the back seat rest, where the 1<sup>st</sup> and 2<sup>nd</sup> appellant sat, a toy pistol was recovered. PW4 searched the 2<sup>nd</sup> appellant and found on him Shs 80,000/- wrapped in a nylon paper and tied to his testicles. His colleagues searched the other suspects and more money was recovered, together with two packets of sportsman cigarettes. PW4 stated that PW3 had told him that the suspect (3<sup>rd</sup> appellant) had scars on his lips and nobody else fitted that description in the vehicle from which he was removed.

Cross-examined by Mr. Kilele, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> appellant PW4 was emphatic that it was the 3<sup>rd</sup> appellant who had the sword and that it was him who picked out the other appellants. Explaining his reference to him as **Isaac Njonjo**, PW4 told the court that he had confused the names of the suspects. Under cross-examination by the 1<sup>st</sup> appellant PW4 testified that the 3<sup>rd</sup> appellant did not give the names of his accomplices but they were arrested at Kongoni Police Station where they had been for hours. He said the same when cross-examined by the 4<sup>th</sup> accused person adding that he and his colleagues trusted what the 3<sup>rd</sup> appellant had told them and that it was on that basis they pursued the other suspects following his lead. **PW5, P.C. James Kipkemboi** testified that he was, on the material date, on duty at Ngodi (Nkondi) patrol base and at about 5.30 a.m. APC Tanui, an officer from Sakutiek AP's camp arrived in the company of members of the public requesting assistance in the detention of a certain matatu known as "*Kamucii*." PW5 called the OCS Kongoni police station to give the assistance. The 3<sup>rd</sup> appellant was with the team from Sakutiek Centre. PW5 joined the group and walked towards Kongoni Police station. Whilst they were about 1km away a police vehicle came. They all boarded it and on arrival at Kongoni police station they found the matatu that they were pursuing. Passengers had alighted. He testified that a search was conducted but he himself did not participate in the same. He, however, saw a bundle of money but did not count it. He also said that when the 3<sup>rd</sup> appellant was brought to Ngodi (Nkondi) patrol base he had nothing in his possession. However, under cross-examination by the 2<sup>nd</sup>

appellant PW5 stated that the 3<sup>rd</sup> appellant was said to have been removed from a matatu. In further cross-examination by the 3<sup>rd</sup> appellant PW5 stated that when he was brought to their camp, a report was made that the 3<sup>rd</sup> appellant was with others who remained in the matatu that they later pursued.

**PC Bonface Mutuku** of Kongoni police station (**PW6**) testified that on 20<sup>th</sup> December 2004 at about 5.30 a.m. he was woken up and told that he was needed by the OCS at the report office. He proceeded there and was informed that a report had been received from the Anti-Stock Theft, Sakutiek to the effect that a robbery had taken place at Sakutiek area and that suspects in that robbery were in a matatu which was headed towards Kongoni. PW6 and his colleagues quickly rushed to the Kongoni- Maela road. After a short while a minibus arrived. It was stopped and the driver ordered to drive it to the police yard. Passengers were searched and some suspects were found in possession of a lot of money hidden in their underpants. He testified that the 1<sup>st</sup>, 2<sup>nd</sup> appellant together with the 4<sup>th</sup> accused were all found with money held under their underpants and in their trouser pockets and were therefore held to be suspects in the Sakutiek robbery. Together with the 3<sup>rd</sup> appellant they were booked in the cells and the money and a toy pistol which was also recovered were kept as exhibits.

**C.I. Josphat Ndungu** was the 7<sup>th</sup> prosecution witness (**PW7**). He testified that on the 20<sup>th</sup> December 2004, while performing station duties at Kongoni police station, he received a call from **PC Maiyo (PW5)** of Ngodi (Nkondi) police patrol base who informed him that there were, in a mini bus (matatu) heading towards Kongoni from Maela on its way to Naivasha, some suspected robbers who had committed a robbery at Sakutiek. PW6 mobilised his men and laid an ambush for the vehicle which arrived at around 6.00 a.m. The vehicle was stopped and ordered to drive to the police station. It was searched and a home-made pistol was recovered with one of the passengers who was the 1<sup>st</sup> accused (2<sup>nd</sup> appellant). The 1<sup>st</sup> appellant pointed out the 2<sup>nd</sup> appellant and the 4<sup>th</sup> accused saying that they were involved in the commission of the robbery at Sakutiek. The 3<sup>rd</sup> appellant was brought later by police officers. The suspects were searched thoroughly. They were asked to remove all their clothes. The 1<sup>st</sup> appellant was found in possession of Ksh 80,000/- hidden under his underwear. The 2<sup>nd</sup> appellant was found in possession 45,250/= also placed in his underpants. No money was recovered from the 4<sup>th</sup> accused. The other passengers were released while the suspects were held. The 3<sup>rd</sup> appellant was later brought by police officers from Ngodi (Nkondi) who said that it was he who had stated that his accomplices were in the vehicle that had been intercepted. He was re-arrested but nothing was recovered from him. However the officers who had arrested him handed PW7 a sword said to have been recovered from the 3<sup>rd</sup> appellant. The sword was said to have been one of the stolen items. PC Peter Ngugi PW8 told the court that he was at the material date attached to Kongoni police station and that he is the one who received the telephone call from PW5 informing him of the incident. He testified further that it was him, together with PC Abuatum who got into the intercepted motor vehicle and asked the conductor to pin point any passengers who had boarded the vehicle at Ngodi (Nkondi) and also to have them separated from those who had boarded at Maela. There were three persons who did not move. Two of them were seated on the rear most seat on the side reserved for two persons per seat. The third one was in the front but on the same side. They were the only persons who had boarded the matatu at Ngodi (Nkondi). PW8 went closer to the men and asked them to raise their hands. They complied. From one of them PW8 found two packets of sportsman cigarettes and a toy pistol. The 2<sup>nd</sup> one, whom PW8 said was the 1<sup>st</sup> appellant, had at the waist, a string, hanging strangely out of his trousers and which appeared to pass between his legs. The 2<sup>nd</sup> appellant was asked to put his legs astride. When the string was pulled a bunch of notes fell to the ground and the OCS took it.

Soon afterwards, a vehicle came from Ngodi (Nkondi) direction carrying, among others, PW5. He was carrying a sword and had the 3<sup>rd</sup> appellant with him in handcuffs. The 3<sup>rd</sup> appellant pointed out the 1<sup>st</sup> and 2<sup>nd</sup> appellant's to PW5. The 2<sup>nd</sup> appellant was searched and a bunch of money was also recovered tucked in his underwear. PW8 testified that he recovered Kshs 80,000/- from the 1<sup>st</sup> appellant and Kshs 45,350/= was recovered from the 2<sup>nd</sup> appellant. Under cross-examination by the 3<sup>rd</sup> appellant, PW8 stated that the 3<sup>rd</sup> appellant pin-pointed his co-accused after they had already been arrested and that when he was brought he was said to have been found with the Maasai sword. The last prosecution witness

**Samuel Sakwod (PW9)** testified that he was the investigating officer in the robbery incident of 19<sup>th</sup> December 2004. He stated that, he was informed of the robbery by the OCS Kongoni. He then proceeded to Kongoni and collected the suspects together with a sum of Kshs 125,350/=, a home-made gun and two packets of cigarettes which had been booked as exhibits. He interrogated the suspects and they were charged with the offence for which they were tried and convicted.

In his defence, the 1<sup>st</sup> appellant testified that he was a farmer and that on the 21<sup>st</sup> December 2004 he was heading to his home in Naivasha where he had been summoned urgently. He boarded a matatu which was stopped by police officers at Ngodi (Nkondi) before proceeding to Kongoni where it was intercepted and detained at Kongoni police station. He was searched and found with Kshs 65,000/= which was in his pocket and socks. He said that despite his having told the police that the money was from his business, he was nonetheless arrested and charged with an offence he was not aware of. The 2<sup>nd</sup> appellant's defence was that he was both a farmer and a cereals broker within Moidabi and Karagita trading centres. He testified that on 21<sup>st</sup> December 2004 he boarded a matatu called "Kamucii" on his way to Karagita. Close to the gate of Kongoni police station the vehicle was blocked by a GK vehicle and the driver of the matatu ordered to drive the same to the police station. The passengers were subjected to a search and Kshs 500 was found on him. The 3<sup>rd</sup> appellant testified in his defence that he lived in Nairobi where he was a radio repairer. He told the trial court that on 20<sup>th</sup> December 2004 he had visited his sister, who lives at Ngodi (Nkondi) centre in answer to an invitation for him to get to know where she was living. He had spent the night there. The following day at about 5.30 a.m. he woke up and set out to return to Nairobi. While at the bus stage he was confronted by a group of people in the company of police officers. Although there were five people at the bus stage he alone was asked to identify himself. He was interrogated and then arrested and later escorted to the Anti-stock Theft Unit camp. He was questioned further and then transported to Kongoni police station where he was thrown into the cells. Later he was transferred to Narok police station together with three other suspects. At Narok police station he was informed of the charges preferred against him which he said he knew nothing about.

After carefully analyzing the evidence tendered before him the learned trial magistrate concluded, first of all, that PW1's evidence had proved beyond doubt that a robbery with violence had been committed against her on 19<sup>th</sup> December 2004, by three armed men, one of whom placed a gun on her neck and threatened to kill her. In the process they took off with a sum of money, a maasai sword and two packets of cigarettes. She was able to see her assailants in the solar powered electricity lighting and bright moonlight, although she was too terrified to identify them. She raised an alarm and a neighbour who ran a hotel in the same business premises (PW3) came to her aid, as did some administration policemen and members of the public. PW3 informed those gathered at the scene that there had been a stranger at his hotel just before PW1 raised the alarm. PW3 described the stranger as having scarred lips. PW3's suspicion led to the arrest of the 3<sup>rd</sup> appellant who, when arrested from a matatu, told the arresting officers that his accomplices had proceeded in their escape bid in the same matatu he was removed from. He himself was found in possession of a Maasai sword which had been taken from PW1's shop. The matatu was apprehended and the 1<sup>st</sup> and 2<sup>nd</sup> appellants were found ferrying huge sums of money hidden in the strangest places – their underpants. In the seat where the 1<sup>st</sup> appellant was seated a toy pistol was recovered.

The learned trial magistrate considered the circumstantial evidence adduced against the 3<sup>rd</sup> appellant as regards his having been at the scene of the robbery just before the same was committed and being found with one of the stolen items as providing proof beyond doubt that he was one of the culprits. The 3<sup>rd</sup> appellant's pointing out of his co-appellants, taken together with the fact that they too were found with items stolen from the complainant left no doubt in the learned trial magistrate's mind that they were also culprits. We find no fault in his findings.

Our careful analysis and re-evaluation of the entire evidence adduced at the trial, the sequence of events, and the corroborated evidence as to the attack, theft, pursuit of the robbers, leading to the recovery of items stolen from the complainant, leaves us with no doubt at all that the appellants were indeed the persons who violently robbed the complainant herein. We are of the considered view that there was no

likelihood of mistaken identity. We share the learned trial magistrate's view that their respective defences did not hold and consider them to have been properly rejected. We see no material contradictions in the evidence adduced against them by the various witnesses.

Accordingly the appeals herein are hereby dismissed in their entirety.

**Dated signed and delivered at Nakuru this 10<sup>th</sup> day of July 2009**

**M. KOOME**

**M. G. MUGO**

**JUDGE**

**JUDGE**

**In the presence of:**

N/A - For State

3 appellants present in person